

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 185 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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CHIEF EXECUTIVE OFFICER & VICECHAIRMAN

Versus

DECD. PATEL GANDU PABA THRO' L.H. JIVITIBEN GANDUBHAI

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Appearance:

Mr Satyapal Gusain, party-inperson for Petitioner  
MR PK JANI for Respondent No. 10

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CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 18/04/98

ORAL JUDGEMENT

This Revision Application under Section 115 CPC is at the instance of the Chief Executive Officer & Vice Chairman, Gujarat Maritime Board against the order dated 3.1.1993 passed by the Second Joint Civil Judge (SD), Jamnagar, whereby the learned Judge granted application Exh.25 of the plaintiff in Civil Suit No.85/97 restricting Mr S.P. Gusain, Dy.Collector in the Gujarat

Maritime Board (for short, 'the GMB') from making any submission before the said Court.

2. Necessary facts are that the respondent-plaintiff filed Civil Suits in the Court of Second Joint Civil Judge (SD), Jamnagar against the GMB for declaration and permanent injunction by which they have challenged the record of Right Entry No.2368 of Mortgage of Lands of Village Keshia, Taluka Jodia, Dist.Jamnagar bearing Survey No.584, 405, 612. 281 owned by late Gandu Paba and survey No.523, 582, 559, 27 and 546 of village Keshia, Taluka Jodia, Dist.Jamnagar owned by late Mavji Natha. They, inter alia, also challenged the execution of declaration bonds, security bonds and Agreement Deeds duly executed by their ancestors Late Gandu Paba and late Mavji Natha before Executive Magistrate, Jamnagar and other competent authorities for having stood sureties to defendant No.3 namely; Abdul Gani Ismail Mandalia for Rs.3,15,000/- given as loan for construction of Mechanised Vessel in favour of Government of Gujarat through the then Director of Ports, Gujarat State.

3. Mr S P Gusain, Dy.Collector & Senior Legal Advisor of GMB filed appearance in the said suit being Civil Suit No.85/97 after duly authorised by the Vice Chairman and Chief Executive Officer, GMB.

4. The appearance of Mr Gusain was objected by the learned Advocate for the plaintiff by way of filing Application Exh.25 stating, inter alia, that Mr S P Gusain who is working as Dy.Collector under the GMB, is appointed as authorized person by the GMB, but he has not filed any appearance memo as a Principle Officer as provided under Order 29 of the Civil Procedure Code. It is also stated that Rule 3 of Order 2 of the CPC has been amended by the High Court of Gujarat. It is only the general power of attorney holder has right of appearance on behalf of GMB. According to the plaintiff, Mr Gusain is neither holding any power of attorney nor he is holding any Sanad, from Gujarat Bar Council or from any other State and hence he has no right to plead on behalf of the GMB and hence he may be restrained from pleading on behalf of GMB.

5. The trial Court, relying on a decision of the Bombay High Court, in the case of A S PATEL v. NATIONAL RAYON CORPORATION, reported in AIR 1955 Bombay 262, held that the expression "appearance" under Order 3 Rule 1 of CPC does not include the right of audience in Court. In view of this, the Court held that Mr Gusain has no locus

standi to pleade on behalf of defendant No.1-GMB.

6. I have heard Mr Gusain. At the outset, to shorten the controversy, it is made clear by Mr Gusain that he does not claim any legal right of audience or right of practice as he has not enrolled himself as an Advocate. His only say is that by virtue of his designation as Dy.Collector-cum-Sr.Legal Advisor in the GMB, he has been authorised by the Vice Chairman & Chief Executive Officer, GMB to appear and represent GMB in particular cases only. He has been filing appearance in various Courts on behalf of GMB and has argued the matter only with prior permission of the concerned Court or authority or person in that particular case as provided under section 32 of the Advocates Act, 1961. He has also furnished a list of cases shown at Annexure 'A' wherein he has put in appearance and he has been given audience by various Courts right from the Supreme Court, down below to the Court of Civil Judge (JD). He has also referred to one of the decisions of the Apex Court in the case of CHIEF EXECUTIVE OFFICER & VICE CHAIRMAN, GUJARAT MARITIME BOARD v. HAJI DAUD HAJI HARUN ABU, reported in {1996} 11 SCC 23 wherein the Hon'ble Supreme Court of India granted audience on the basis of merely a memorandum of authority and the memo of appearance. The sample of the authority letter and the memo of appearance filed by Mr Gusain in different Courts is reproduced as follows:

The Memorandum of Authorization dated 18.11.1997 reads as under:

GUJARAT MARITIME BOARD

M E M O R A N D U M

"In exercise of the powers conferred under Gujarat Maritime Board Act, 1981, I, K. Kailashnathan, IAS, Vice-Chairman & Chief Executive Officer, Gujarat Maritime Board, Ahmedabad, do hereby authorize and confer upon Shri S P Gusain, Dy.Collector-cum-Senior Legal Advisor, Gujarat Maritime Board, Ahmedabad all the powers and duties to appear, to represent, to file petitions/affidavits, to make submission and to take all the necessary steps under the law on behalf of the Gujarat Maritime Board in Special Civil Suit No.85/97 in the Court case of heirs of deceased Gandu Paba and heirs of deceased Mavji Natha and others before the Hon.District Civil

Courts at Jamnagar and Hon.High Court of Gujarat,  
at Ahmedabad and it shall be binding to the  
Gujarat Maritime Board and it shall have no  
objection whatsoever."

xxx

xxx

xxx

" MEMO OF APPEARANCE

xxx

xxx

xxx

Sir,

Please enter an appearance for the above named  
Applicant, namely Gujarat Maritime Board, Ahmedabad in  
the above mentioned Civil Revision Application and oblige  
by granting requisite permission.

(Sd/-)

(S P Gusain)

Party-in-person

Power Attorney Holder

Dy.Collector-cum-Senior Legal Advisor  
Gujarat Maritime Board, Ahmedabad 16"

It is contended by Mr Gusain that the learned Judge has  
committed error in exercise of jurisdiction illegally in  
holding that he has no locus standi to plead on behalf of  
the GMB. It is submitted that the learned Judge has  
failed in interpreting and assessing what in a particular  
case constitutes "recognised agent" and "party-in-person"  
for the purpose of Order 3 of the CPC and it is  
unrealistic to exclude from the considerations that go  
into judicial verdict, these factors which are peculiar  
to and characteristic of the functioning of the  
Government and the statutory corporate bodies like  
Gujarat Maritime Board. It is asserted that certain  
amount of latitude, is therefore, not impermissible. The  
learned Judge ought to have appreciated that those who  
bear responsibilities of Govt/statutory Board must have a  
"little play at the joints". It is further submitted  
that refusing to give permission to a non-Advocate to  
appear can result in a meritorious and deserving matter  
like the present case being thrown out at the very  
threshold and cause unnecessary financial burden on a  
statutory body and cause of justice being delayed or even  
defeated. It is also argued that Advocates cannot claim  
absolute right to practise and the power under section 32  
of the Advocates Act is vested in Courts for special  
circumstances to be exercised judiciously. He has also

reminded that the judiciary is respected not on account of its power to legalise injustice on technical ground but because it is capable of removing injustice and is expected to do so. He has referred to a decision in the case of HARISHANKAR V. GIRDHAARI, reported in AIR 1978 SC 1019, wherein it is held that it is open to a person, who is party to a proceedings, to get himself represented by a non-Advocate in a particular instance or case. He has particularly invited my attention to the following observations:

"Practising a profession means something very different from representing some friend or relation on one occasion or in one case or on a few occasions or in a few cases."

He has also referred to "Maxwell on the Interpretation of Statutes" for the purpose of interpretation of Section 32 and 33 of the Advocates' Act. It is said therein at page 45 thus -

"If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

7. As the matter is of some importance, I issued notice to the Gujarat Bar Council. Mr P K Jani, learned Advocate appears on behalf of the Gujarat Bar Council. It is submitted by Mr Jani that the right of appearance under Order 3 Rule 1 CPC does not include the right to plead. He has referred to the binding decision reported in AIR 1955 Bombay 262. He has also referred to a decision of the Andhra Pradesh High Court, reported in AIR 1990 AP 8340. Referring to the scheme of Advocates Act, 1961, it is submitted that the Parliament has conferred the right of practise in a Court of law only on a person granted Sanad by the Bar Council. He has also submitted that the right to practice carries on certain obligations towards his client and the Court. An Advocate is subjected to disciplinary proceedings. In this regard, he has referred to decisions of the Apex Court reported in AIR 1995 SC 691 and AIR 1996 SC 1708.

8. Thus, the question arises for consideration is "whether a non-Lawyer like Mr S P Gusain should be permitted to continue or argue in routine, on behalf of

his employer like, GMB under the guise of seeking permission in individual cases ?

9. An Advocate holds a unique place in the administration of justice. In addition to the basic qualification of Law degree which provides elementary knowledge of different branches of law, experience gained in the daily application of law and interpretation of law and are best aware of the perfection of the legal system, their close contacts with all sections of the society to constitute a most competent class of man to assist the Court in administration of justice for the common good of the people. Thus, there is a consensus that a non-lawyer should not be permitted to appear to represent another. That appears to be the purpose behind Order 3 Rule 1 CPC and provisions of section 33 of the Advocates Act, 1961.

10. In order to appreciate the controversy, it will be necessary to acquaint with Order 3 Rule (1) CPC and some of the provisions of the Advocates Act, particularly sections 29, 32 and 33. Order 3 Rule 1 is reproduced as follows:

"1. Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. Provided that any such appearance shall, if the court so directs, be made by the party in person."

Analysis of Rule 1 clearly shows that the appearance can be made by -

(i) Recognized agents, or

(ii) Pleader

The Rule does not apply where the law for the time being otherwise expressly provides. Thus, it is the law for the time being in respect of recognized agent and pleaders differently. Rule 2 defines 'Recognized Agents' under clause (a) as follows:

"(a) Persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties."

In Bombay case (AIR 1955, 262), dealing with the expression "appearance". the Court held that it does not include pleading. Right of audience in the Court, right to examine and cross-examine witnesses are all parts of pleading with which Order 3 does not deal at all. It deals with restricted class of acts in connection with the litigation in Court, and it is with regard to that restricted class of act that Order 3 permits recognized agents to be appointed. The Court also held that the expression 'right to practice' under section 3 of the Bar Council of Gujarat Rules is an expression much wider than the right to plead. It includes both the pleading and acting and the Bar Council has conferred their right only on those persons who have been enrolled as Advocates of High Court. Similar view has been taken by the Rajasthan High Court in AIR 1959 Rajasthan 35.

11. Section 33 of the Advocates' Act permits the Advocates alone to practice. The Section reads as follows:

"Advocates alone entitled to practise - Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this act."

Exceptions to the said provision is contained in Section 32 which empowers the Court to permit in a particular case to a person who is non-Advocate. Section 32 reads as under:

"32. Power of court to permit appearance to particular cases - Notwithstanding anything contained in this chapter, any court, authority or person may permit any person, not enrolled as advocate under this Act, to appear before it or him in any particular case."

The Advocates' Act came into force on 19.5.1960. Dictionary of the Act as found in section 2 (a) "Advocate" means an advocate entered in any roll under the provisions of this Act. as such and the term "roll" as defined in 2 (k) is a roll of advocates prepared and maintained under this Act. Section 24 provides the qualification for a person to be admitted as Advocate. Chapter IV deals with the right to practise under the

provisions of law. Section 29 says that subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocate. Section 30 provides that every Advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends. Section 33 says that an Advocate alone is entitled to practise. Section 33 gives the monopoly to the profession when it says that no person shall be entitled to practise unless he is enrolled under the Advocates Act. Section 32 is exception to the said Act to the extent that the Court in a given case, may permit even a person not enrolled under the Advocates' Act to appear before it. Section 49 gives general power to the Bar Council of India to frame rules. The Bar Council of India in exercise of powers under section 49 has framed the Rules of "Professional Ethics" Preamble of the Rules says that "an Advocate shall, at all times, comport himself in a manner befitting his status as an Officer of the Court, privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an Advocate. The Rules are divided in various parts. Part I speaks about the duty of the Advocate to the Court. Part II states duties towards the client. Part III provides duty to opponent. Part IV provides duty to the colleagues. Part V casts duty on the Advocate to render the legal aid to the indigent and oppressed persons. Part VI puts a restriction on other employment. It says that an advocate shall not personally engage in any business which shall not be a full time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise.

12. Thus, it is evident that an Advocate, as an Officer of the court, he does not only enjoy the monopoly of right of practice, but there are also certain obligations to be discharged. He is also subject to disciplinary proceedings under the Act. Section 35 of the Advocates Act provides punishment to Advocates for misconduct. The Act provides constitution of disciplinary Committee which has been given power to suspend an Advocate from practice for such a period which it may think fit. Complete mechanism is provided which includes appeal to the Bar Council of India and second appeal to the Supreme Court of India. Section 45 provides imprisonment upto six months or fine if any



person practises in any Court or before any authority or person, in or before whom he is not entitled to practise under the provisions of the Act. Thus, it is evident that in the Advocates' Act, an Advocate does not only enjoy the monopoly of right to practise but certain obligations are also cast on him. He is also subjected to disciplinary action by the Bar Council of India. Advocate is supposed to fully devote to the profession. He cannot personally engage himself in any business. He is also not permitted to be in the employment of any person, Government, firm or a corporation. Recently a question came up before the Apex Court as to whether a medical practitioner is entitled simultaneously to carry on profession as an Advocate. The Court, considering the various provisions of the Advocates Act, held that "legal profession requires full time attention and would not countenance an Advocate riding two horses or more at a time. The court emphasised that he has to be full time Advocate or not at all. If the person riding on two horses, the court observed that it would lead to a person who will neither be in heaven nor on earth. The Court said thus:

"It is axiomatic that an advocate has to burn midnight oil for preparing his cases for being argued in the court next day. Advocate face examination every day when they appear in courts. It is not as if that after court hours advocate has not to put in hard work on his study table in his chamber with or without the presence of his clients who may be available for consultation. To put forward his best performance as an advocate he is required to give whole hearted and full time attention to his profession. Any flinching from such unstinted attention to his legal profession would certainly have an impact on his professional ability and expertise. If he is permitted to simultaneously practise as a doctor then the requirement of his full time attention to the legal profession is bound to be adversely affected. Consequently however, equally dignified may be the profession of a doctor he cannot simultaneously be permitted to practise law which is a full time occupation. It is for ensuring the full time attention of legal practitioners towards their profession and with a view to bringing out their best so that they can fulfil their role as an officer of the court and can give their best in the administration of justice that the impugned rule has been enacted by the State legislature. It, therefore, cannot

be said that it is in any way arbitrary or that it imposes an unreasonable restriction on the new entrant to the profession who is told not to practice simultaneously any other profession and if he does so to deny to him entry to the legal profession."

Thus, there is a conflict between the "professional" and the "lay" approach. David Pannick, a Barrister practising in London in his famous book "Advocates" 1993 edition, at page 164 has said "there is a conflict between the professional and the lay approach to the ethics of advocacy. The lawyer addresses the issue from the legal perspective. Competent advocacy, performed within the confines of professional duties not to mislead the court, will further the objectives of the law by helping to ensure that the correct legal result is achieved, or that the judge or the jury have been provided with the information required to make the best legal decision possible." David Pannick further said that layman is not so interested in the ethics of the legal system. Thus, in the given case, the Court may permit even a person not qualified in law, but such power cannot be exercised in routine. Mr Gusain himself was permitted by the Supreme Court in the case reported in (1996) 11 SCC 23. but this cannot be understood as that he should be permitted by Courts as a matter of routine. The way the GMB has been authorising him to appear in the cases and the list of cases which clearly shows that it is not the case where Mr Gusain has been appearing in certain selected cases, but it is a matter of routine, and therefore, in fact he is practising the profession in the guise of memorandum of authorization. The authority which Mr Gusain has referred to i.e. AIR 1978 SC 1019, the Court has said that such a person cannot practise the profession habitually representing parties in Court. The Court said thus -

"If a non-Advocate specialises in practising in court, professionally he will be violating the text of the interdict in the Advocates Act. I cannot allow him to do so. Nevertheless, it is open to a person, who is party to a proceeding, to get himself, represented by a non-advocate in a particular instance or case. Practising a profession means something very different from representing some friend or relation on one occasion or in one case or on a few occasions or in a few cases. In the present instance, permission is sought for representation through a non-advocate. It is absolutely clear that anyone

who is not an advocate, cannot as of right, force himself into this court and claim to plead for another. Permission may, however, be granted by this Court taking the justice of the situation and several other factors into consideration for such non-professional representation."

Thus, in my view, the learned Judge was right in holding that Mr Gusain cannot be permitted to appear.

13. Consequently, I find no merit in this Civil Revision Application and the same is summarily rejected.

14. Mr Gusain present in the court submits that under the instructions of the Vice Chairman and Executing Officer, GMB, operation of this order be stayed for a period of 4 weeks with a view to enable him to approach the higher forum. I am not inclined to grant the prayer for the simple reason that there was no stay on the order dated 3.1.1998 and I have rejected the revision, and therefore, no question of staying this order arises.

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msp